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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE CAPACITORS ANTITRUST
LITIGATION

This Document Relates To:
DIRECT PURCHASER PLAINTIFFS
ACTION

Master File No. 3:14-cv-03264-JD
MDL No. 2801

JOINT PRETRIAL STATEMENT

Trial Date: March 2, 2020
Time: 9:00 a.m.
Place: Courtroom 11, 19th Floor
Hon. James Donato

I. SUBSTANCE OF THE ACTION

Plaintiffs' Statement

This is a certified class action asserting claims for damages for violations of the Sherman Act. 15 U.S.C. § 1. Defendants are, or were, the worldwide leaders in the production of certain types of capacitors, a necessary component of every electronic product. From at least as early as January 2002 until at least through the end of December 2013, they engaged in a cartel to artificially inflate the prices of capacitors that they sold. This was an effort to stave off inevitable price declines that would have otherwise occurred in a competitive market.

Plaintiffs

Plaintiffs are direct purchasers of capacitors in the United States.

Defendants

The named Defendants are:

- AVX Corporation
- ELNA Co. Ltd. and ELNA America, Inc.
- Fujitsu Semiconductor America, Inc., and Fujitsu Components America, Inc.
- Hitachi Chemical Co., Ltd., Hitachi Chemical Company America, Ltd., and Hitachi AIC Incorporated
- Holy Stone Enterprise Co., Ltd., Holy Stone International,
- KEMET Corporation and KEMET Electronics Corporation
- Matsuo Electric Co., Ltd.
- Nippon Chemi-con Corporation
- NEC TOKIN Corporation and NEC TOKIN America, Inc.
- Nichicon Corporation and Nichicon (America) Corporation
- Nissei Electronic Co. LTD.
- Nitsuko Electronics Corporation
- Okaya Electric Industries Co., Ltd. and Okaya Electric America, Inc

- 1 • Panasonic Corporation, Panasonic Corporation of North America
- 2 • ROHM Co., Ltd. and ROHM Semiconductor U.S.A., LLC
- 3 • Rubycon Corporation and Rubycon America Inc.
- 4 • SANYO Electric Co., Ltd., SANYO North America Corporation
- 5 • Shinyei Kaisha, Shinyei Technology Co., Ltd., Shinyei Capacitor Co., Ltd., and
- 6 Shinyei Corporation of America, Inc.
- 7 • Shizuki Electric Co., Ltd
- 8 • Soshin Electric Co., Ltd. and Soshin Electronics of America, Inc
- 9 • Taitso Corporation and Taitso America, Inc.
- 10 • Toshin Kogyo Co., Ltd.
- 11 • United Chemi-Con, Inc.

12 Defendants are horizontal competitors. They each manufacture, sell and distribute
13 capacitors to the members of the direct purchaser class.

14 **Inter-Competitor Meetings, Communications, and Information Exchange**

15 A primary mechanism of the conspiracy was the systematic and regular exchange of
16 highly confidential business information between and among the defendants. This included
17 information that was 1) related to price, output, or cost; (2) current or projected (not just
18 historical); (3) company-specific (not merely aggregated); and (4) communicated directly
19 between competitors (not through a third party). Often the information pertained to
20 particular customers. The information involved several major categories of capacitors—
21 aluminum, tantalum, and film—and various sub-categories of capacitors that the
22 conspirators identified during their conspiratorial meetings (all except for one very small
23 sub-category: tantalum wet). Competitors would not share this sort of information in the
24 absence of a conspiracy.

25 The information exchanges preceded regularly scheduled meetings held either at
26 Defendants' offices or at times at clandestine places at which the participants would orally
27 discuss in more detail the information that had been exchanged. At the beginning of the
28 meeting, there would be a presentation by each company of their performance over the

1 prior period of time (sometimes it was a calendar month, sometimes a quarter), including
2 sales quantity and revenues, along with a discussion of “market conditions,” which
3 frequently included a discussion of prices, pricing, the need to coordinate, specific
4 customers, responses to specific requests for quotations (RFQs), costs, and the effect of
5 exchange rates on pricing. At the meetings, the participating companies made reports in
6 sequence of the company codes in the reports that they had provided prior to the meeting,
7 and they were expected to ask and answer questions about the reports in the meeting. The
8 companies shared information about customers (including in Japan and overseas markets),
9 including orders, price negotiations, price adjustments, and overall industrial development
10 trends. They would answer each other’s questions about the information. This was typically
11 followed by visits to pubs or izakayas, where drinks would flow and much more
12 information would be exchanged.

13 Defendants also met for “President’s Meetings,” held twice yearly at expensive,
14 exclusive resorts, far from prying eyes, where the top executives of the defendants could
15 make sure that their plans were being executed faithfully by their subordinates. Explicit
16 discussion of pricing occurred more frequently at Presidents’ Meetings, where the
17 participants engaged in high-level planning. For a Presidents’ Meeting, in addition to on-
18 site distribution of the standard forms filled out for monthly meetings, the company in
19 charge would also notify participants by email in advance to fill out spreadsheets with the
20 forecast demand forms of capacitors for their important products. The materials completed
21 by the companies would be distributed at the monthly meeting before the Presidents’
22 Meeting for discussion about their correctness. The company in charge would summarize
23 the monthly meeting discussion results and make a five-year demand prediction report
24 based on the forecast demand filled out by the participating companies. This would be
25 discussed and once again confirmed at the meeting.

26 After a meeting, most of the participating representatives would prepare meeting
27 minutes or summaries and disseminate them within their respective companies. In some
28 cases, meeting minutes were circulated in writing to senior executives in charge of

1 branches throughout the world, to assure the worldwide effectuation of the agreements
2 reached in Japan. This information was used in setting prices, determining pricing strategy,
3 and negotiating prices with actual or potential customers. Plaintiffs have been able to
4 document well over 400 regular group meetings and over 2,200 inappropriate inter-
5 competitor meetings, contacts, and exchanges of information. The systematic information
6 exchanges were illegal and permitted the defendants to artificially inflate the prices of
7 capacitors that they sold. The systematic information exchanges were supplemented when
8 necessary with customer-specific agreements, product-specific agreements, bid rigging and
9 other forms of collusion to maintain the effectiveness of the conspiracy.

10 Most of the conspirators participated in meetings in Japan and in other locations in
11 Asia such as Hong Kong and Singapore. A few—including the American companies,
12 conspirators AVX and KEMET—did not attend those meetings, which were conducted in
13 Japanese. AVX and KEMET did, however, communicate regularly, meet, and share
14 competitively sensitive information with the other conspirators. The same executives at
15 AVX and KEMET met repeatedly with the same executives at the other conspirators who
16 attended the regular meetings in Asia. In addition to the meetings, the conspirators—
17 Japanese and American alike—engaged in extensive bilateral and multilateral
18 communications, including emails and phone calls. The conspirators kept notes of some of
19 their meetings and there are written records of other communications. Some of the
20 conspirators' communications instructed the recipients to destroy them. Certainly, much
21 evidence was lost or destroyed pursuant to directions like "delete after reading."

22 Defendants monitored and policed their agreements, and confronted their co-
23 conspirators upon learning about deviations from the agreed upon price increases or that
24 individual co-conspirators were lowering prices. Defendants recognized that their meetings
25 and the scheme of which they were a part were illegal and wrong, and there is explicit
26 discussion at meetings and elsewhere of concern that they could be criminally prosecuted
27 for their activities. In addition, many of the meetings took place away from their business
28 offices in order to conceal the meetings' existence and Defendants' participation in them.

1 Plaintiffs allege and intend to prove a single conspiracy, and no other conspiracy,
2 conspiracies, or conspiracy theories should be mentioned or referred to in this case.
3 Defendants appear to take the position that the guilty pleas entered in the related criminal
4 case all involve separate conspiracies. They may seek to prove that if they wish, but that is
5 not the case that Plaintiffs intend to prove. To be sure, the Japanese meetings at times
6 focused separately on electrolytic and film capacitors, and at times separately on aluminum
7 and tantalum capacitors. The evidence supports a finding of a single conspiracy for various
8 reasons. First, almost all of the group meetings, no matter what type of capacitors were
9 involved, had the same basic structure—including sharing competitively sensitive
10 information between conspirators. Second, it made sense for the conspirators to use the
11 same structure within a single conspiracy for different types of Capacitors. Just as a single
12 business can sell various products, not all of which are substitutes for each other—
13 supermarkets and hardware stores are two of countless examples—a single conspiracy can
14 apply to multiple kinds of products. Indeed, the conspiracy to which many conspirators
15 confessed involved different capacitors of different sizes and uses. Third, some of the
16 conspirators attended both electrolytic and film meetings and manufactured both kinds of
17 capacitors. Fourth, the participants discussed film capacitors at electrolytic meetings and
18 electrolytic capacitors at film meetings. Fifth, there are overlaps between the uses of some
19 electrolytic and film capacitors.

20 This is not an exhaustive list. The admissible evidence, when considered in its
21 totality, will demonstrate the conspiracy alleged by Plaintiffs. The governing principle was
22 established long ago in *Continental Ore Co. v. Union Carbide & Carbon Co.* and remains
23 true today.

24 “(T)he character and effect of a conspiracy are not to be judged by dismembering it
25 and viewing its separate parts, but only by looking at it as a whole. *United States v.*
26 *Patten*, 226 U.S. 525, 544 (1913), and in a case like the one before us, the duty of
27 the jury was to look at the whole picture and not merely at the individual figures in
28

it.” *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944). See *Montague & Co. v. Lowry*, 193 U.S. 38, 45 (1904).
370 U.S. 690, 699 (1962).

Guilty Pleas

These defendants pled guilty to criminal violations of the antitrust law. 15 U.S.C. § 1:

- ELNA
- Hitachi
- Holy Stone
- Matsuo
- NEC TOKIN
- NCC
- Nichicon
- Rubycon

In addition, certain managers and directors were indicted as well. Satoshi Okubo (who worked for ELNA and Matsuo) and Tokuo Tatai (ELNA) both pled guilty to criminal price fixing as individual criminal defendants. Eight others were indicted but have not appeared to answer the charges against them: Takeshi Matsuzaka, Yasutoshi Ohno, Kaname Takahashi, and Takuro Isawa of NCC; Tomohide Date of NEC TOKIN; Masanobu Shiozaki of Nichicon; and Kiyooki Shirotori and Satoru Miyashita of Rubycon. Defendants’ statement below that DPPs have “refused to engage in a meaningful” discussion about stipulating to facts concerning their plea agreements is not correct, as DPPs will explain to the Court at the pretrial conference.

Defendants’ Statement

DPPs allege a single, overarching conspiracy between approximately 22 corporate families of capacitors manufacturers regarding all aluminum, tantalum and film capacitors sold into the United States between 2002 and 2013 in violation of Section 1 of the Sherman Act. (DPPs’ Third Amended Complaint, 14-cv-3264, ECF No. 1831, at ¶¶ 1, 7 (alleging

that Defendants conspired “to implement and effectuate an overarching scheme to control and set the prices of their aluminum, tantalum and film capacitors sold to United States purchasers and purchasers worldwide”), 13.) To prevail on this claim, DPPs must prove (1) the existence of a conspiracy among competitors to fix the prices of aluminum, tantalum, and film capacitors; (2) that each Defendant purposefully or knowingly joined that conspiracy; (3) that the alleged conspiracy occurred in or affected interstate or import commerce; and (4) that the conspiracy caused all, or nearly all, DPPs to pay more for aluminum, tantalum, and/or film capacitors billed to or shipped to the United States than they otherwise would have. ABA Model Jury Instructions in Civil Antitrust Cases, Ch. 1 Instr. 2 and Ch. 2 Instr. 1 (2016); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In addition, DPPs have the burden of proving a non-speculative measure of damages. *Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2013 WL 5391159, at *5 (N.D. Cal. Sept. 24, 2013) (“fact of injury and measure of damages are separate elements of an antitrust claim.”); *Shannon v. Crowley*, 538 F. Supp. 476, 484 (N.D. Cal. 1981) (“proof of damages is an essential element of [an antitrust claim].”); *Knutson v. Daily Review, Inc.*, 468 F. Supp. 226, 229 (N.D. Cal. 1979) (“Plaintiffs in an antitrust suit have the burden of proving damages.”).

Whether DPPs have evidence sufficient to prove each of these elements as to each of the Defendants and alleged co-conspirators remains to be decided. At trial, the evidence will fall far short of establishing what DPPs have pleaded in their Complaint and DPPs will fail to meet their burden of proving each of the elements of the offense, as set forth in Defendants’ Trial Brief.

As also set forth in Defendants’ Trial Brief, the plea agreements entered into between certain Defendants and the U.S. Department of Justice do not support—and in fact specifically refute—DPPs’ broad conspiracy theory. For this reason, Defendants have attempted to reach a stipulation with DPPs regarding presentation of the plea agreements to the jury and the parties’ ability to present additional evidence regarding the plea

1 agreements. To date, DPPs have refused to engage in a meaningful discussion of such a
2 stipulation.

3 **II. RELIEF REQUESTED**

4 ***Plaintiffs' Statement***

5 Plaintiffs seek overcharge damages in the amount of \$513,196,560, trebled, the cost
6 of suit and a reasonable attorney's fee, and prejudgment interest against certain defendants.
7 The single damage number will be adjusted based upon the final determination of opt outs.
8 If Plaintiffs prove that the defendants fixed prices in violation of Sherman Act § 1, they
9 may prove and assess damages:

10 [I]n the aggregate by statistical or sampling methods, by the computation of
11 illegal overcharges, or by such other reasonable system of estimating
12 aggregate damages as the court in its discretion may permit without the
13 necessity of separately proving the individual claim of, or amount of
14 damage to, persons on whose behalf the suit was brought.

15 15 U.S.C. § 15d. *See also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S.
16 555, 563 (1931) (" . . . while [] damages may not be determined by mere speculation or
17 guess, it will be enough if the evidence show the extent of the damages as a matter of just
18 and reasonable inference, although the result be only approximate. The wrongdoer is not
19 entitled to complain that they cannot be measured with the exactness and precision that
20 would be possible if the case, which he alone is responsible for making, were otherwise.").

21 Plaintiffs' expert economist and their expert econometrician, in demonstrating price
22 inflation, use commonly-accepted sophisticated statistical techniques showing price
23 inflation for electrolytic and film capacitors and for various sub-categories of capacitors.
24 The expert analyses also show that the conspirators' prices for electrolytic and film
25 capacitors were inflated in every year of the conspiracy (with one exception, prices for
26 tantalum electrolytic in 2008). The conspiracy thus caused the class to pay inflated prices.
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1 ***Defendants' Statement***

2 Defendants respectfully request that a judgment be entered against DPPs and their
3 claims, and that costs be assessed consistent with the jury's verdict in this matter.

4 **III. UNDISPUTED FACTS**

5 The parties do not dispute the following facts, and will continue to meet and confer
6 in an attempt to agree on other undisputed facts:

- 7 a. Capacitors are essential components of electronic products.
- 8 b. ELNA America, Inc. was during the Class Period and is a wholly-owned
9 subsidiary of ELNA Co., Ltd.
- 10 c. Vishay Polytech Co. f/k/a Holy Stone Polytech Co. was during the Class Period
11 a wholly-owned subsidiary of Holy Stone Enterprise Co., Ltd.
- 12 d. Milestone Global Technology, Inc. was during the Class Period and is a wholly-
13 owned subsidiary of Holy Stone Enterprise Co., Ltd.
- 14 e. United Chemi-Con Inc. was during the Class Period and is a wholly-owned
15 subsidiary of Nippon Chemi-Con Corp.
- 16 f. Shinyei Technology Co., Ltd. and Shinyei Capacitor Co., Ltd. were during the
17 Class Period and are corporate affiliates of Shinyei Kaisha.
- 18 g. Shinyei Corporation of America, Inc., was during the Class Period and is a
19 wholly-owned subsidiary of Shinyei Kaisha.
- 20 h. Taitso America, Inc. was during the Class Period and is a wholly-owned
21 subsidiary of Taitso Corporation.

22 **IV. DISPUTED FACTUAL ISSUES**

23 ***Plaintiffs' Statement of Disputed Facts***

- 24 i. Whether defendants participated in a conspiracy to fix the prices of
25 capacitors.

- ii. Whether the conspiracy caused the prices paid by direct purchasers for capacitors to be higher than they would have been in the absence of the conspiracy.
- iii. Whether the defendants offered pretextual, fraudulent, or misleading explanations for their pricing decisions.

Defendants’ Statement of Disputed Facts

Defendants dispute the following material alleged facts:

- The existence of a conspiracy involving all Defendants, and alleged co-conspirators, to fix the prices of all aluminum, tantalum and film capacitors billed to or shipped to the United States during the entire class period;
- That the alleged conspiracy caused all, or nearly all, DPPs to pay more for aluminum, tantalum, and/or film capacitors billed to or shipped to the United States than they otherwise would have;
- That DPPs have provided a reliable, non-speculative measure of damages;
- That Defendant Holy Stone Polytech Co., Ltd. joined the alleged conspiracy in 2010 knowing all that had preceded its involvement and with an intent to continue an unlawful agreement;
- That Defendant Holy Stone Polytech Co., Ltd. employees acted with the apparent authority of Defendant Holy Stone Enterprise Co., Ltd., a Taiwanese parent organization, and Defendant Milestone Global Technology, Inc., a United States sister organization, such that those organizations can be held liable for the conduct of Holy Stone Polytech Co., Ltd. employees;
- That individual Defendants within the same corporate family engaged in “coordinated activity” such that they can be treated as a single “economic unit” for purposes of the Sherman Act, as required by *Arandell Corp. v. Centerpoint Energy Services*, 900 F.3d 623 (9th Cir. 2018), assuming *Arandell* even applies to this case, which Defendants dispute as set forth below;

- That aluminum, tantalum, and film capacitors are interchangeable with, or substitutes, for one another;
- That DPPs are capable of making the showing necessary in order to invoke the co-conspirator exception to the hearsay rule as to certain exhibits and statements DPPs intend to introduce at trial; and
- Any and all other facts DPPs may assert to support the alleged conspiracy, the existence of classwide antitrust injury, and the amount of damages sought.

V. DISPUTED LEGAL ISSUES

Plaintiffs' Position

- a. Whether the evidence demonstrates a violation of Sherman Act § 1 by the defendants.
- b. Whether defendants' wholly owned subsidiaries should be deemed the same entities as their parents based on the facts and for purposes of this case under *Arandell v. Centerpoint Energy Servs.*, 900 F.3d 623 (9th Cir. 2018).
- c. Whether the statute of limitations has been tolled based on the discovery rule, fraudulent concealment and 15 U.S.C. § 16(i).

Defendants' Position

In addition to the legal issues associated with the pending individual and joint motions for summary judgment and the motions *in limine* filed by the parties with this Joint Pretrial Statement, the disputed points of law concerning liability and relief include the following:

- Whether DPPs have produced sufficient evidence of certain Defendants and alleged co-conspirators, such as AVX, KEMET, Shinyei, Taitso, UCC, Holy Stone Enterprise Co., Ltd., Milestone Global Technology, Inc. and others, joining the alleged conspiracy such that the question of their participation may properly be presented to the jury;

- 1 • Whether the methodologies set forth by DPPs’ economists are legally sufficient
2 to demonstrate that all, or nearly all, class members suffered harm as a result of
3 the alleged conspiracy;
- 4 • Whether the applicable, four-year statute of limitations, 15 U.S.C. § 15b, limits
5 any recovery in this action to damages suffered within the four-year period
6 preceding the filing of DPPs’ original complaint;
- 7 • Whether the doctrine of fraudulent concealment can be applied to private
8 antitrust actions, such as this, where Congress chose to adopt a relatively short
9 statute of limitations period as well as the “injury rule” for such claims; and, if
10 the doctrine is applicable, whether DPPs have satisfied the doctrine’s three
11 elements: (1) that each Defendant took affirmative acts to mislead DPPs; (2)
12 that DPPs did not have actual or constructive knowledge of the facts giving rise
13 to their claim as a result of Defendants’ affirmative acts; and (3) that DPPs acted
14 diligently in trying to uncover the facts giving rise to their claim. *In re*
15 *Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1214 (N.D. Cal. 2015);
16 *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012);
- 17 • Whether the “single entity” theory espoused by DPPs and set forth in *Arandell*
18 *Corp. v. Centerpoint Energy Services*, 900 F.3d 623 (9th Cir. 2018), even applies
19 to certain Defendants within the same corporate family, where there is no
20 evidence of those entities engaging in “coordinated activity,” as there was in
21 *Arandell*; there is no evidence of relevant parent organizations requiring
22 subsidiaries to pass on “rigged and inflated prices” to “buyers outside of the . . .
23 economic unit,” as there was in *Arandell*; there is no evidence that subsidiaries
24 were a necessary component in reaching into the target market, as there was in
25 *Arandell*; and there is no evidence that unlawful profits were “funneled” back to
26 the relevant parent organizations, as there was in *Arandell*;
- 27 • Whether a parent company is liable for the acts of its subsidiary, and vice versa,
28 based solely on their place within the same corporate family, despite the law to

the contrary. *United States v. Bestfoods*, 524 U.S. 51, 68 (2003) (“It is a general principle of corporate law deeply ingrained in our legal system that a corporation is not liable for the acts of its subsidiaries.”);

- Whether the co-conspirator exception to the hearsay rule is applicable to certain exhibits and statements DPPs will seek to introduce at trial; and
- Whether evidence of alleged unlawful conduct overseas is admissible in the absence of evidence tying that conduct to both the alleged conspiracy and to United States interstate or import commerce.

VI. STIPULATIONS

The parties have stipulated that:

- a. Except for expert witnesses and a company representative for each party, witnesses will be excluded from the courtroom during trial.
- b. Documents produced by any party are authentic.
- c. A copy of a document may be used in lieu of an original.
- d. In connection with Defendants’ Motion in Limine No. 4, Holy Stone Enterprise Co., Ltd. shall be referred to by that name or as “Holy Stone Enterprise;” Holy Stone Polytech Co., Ltd. shall be referred to by that name, “Holy Stone Polytech,” or “HPC”; and Milestone Global Technology, Inc. shall be referred to by that name or as “Holy Stone International.

VII. BIFURCATION

The parties do not believe that there is any need for bifurcation or a separate trial of any issues.

VIII. SETTLEMENT

Plaintiffs’ Statement

Plaintiffs have had some form of settlement discussions with all remaining defendants. Some of those discussions are ongoing. While it is possible that there may be

further settlements before trial, Plaintiffs do not believe that the Court needs to take any action concerning settlement.

Defendants' Statement

Defendants have made great efforts to resolve this matter with DPPs during the life of this litigation, including through the use of mediators and other means. These efforts, however, have failed. Nevertheless, Defendants remain open to discussing settlement with DPPs up to and through trial.

IX. TRIAL LENGTH

Plaintiffs' Statement

Trial has been set for five weeks split equally between Plaintiffs and Defendants.

Defendants' Statement

As previously discussed with the Court, Defendants believe that trial of this matter will require at least five weeks. Defendants, however, continue to look for ways to streamline their case and shorten overall trial length.

Dated: Jan. 21, 2020

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